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EXCAPT SERVICES SDN BHD

v.

NEW HERITAGE LIMOUSINE SERVICES SDN BHD & ORS

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HIGH COURT MALAYA, KUALA LUMPUR
KANG HWEE GEE J
[SUIT NO: D8-22-1673-2007]
9 JANUARY 2008

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CIVIL PROCEDURE: *Injunction - Interim injunction, application for discharge - Failure by plaintiff to disclose a material fact - Discrepancy with respect to actual amount of loan that plaintiff had lent to 1st defendant - Reason for difference not disclosed in application for ex parte* D *injunction - Whether non-disclosure of this material fact fatal to plaintiff's application*

CIVIL PROCEDURE: *Injunction - Interim injunction, application for discharge - Plaintiff abused process of court by acting on a frolic of its own after having obtained ex parte injunction - Plaintiff purporting to act* E *upon ex parte injunction even before serving the order upon defendants - Whether abuse of process of court*

Enclosure 4 was the *inter partes* hearing of the application granted *ex parte* on 13 December 2007 and encls. 11 and 12 were the F application by the respective defendants to set aside the *ex parte* injunction. The defendants claimed that there was a very serious non-disclosure of material fact with respect to the actual loan agreement between the parties. The same plaintiff had earlier filed an affidavit in another proceeding wherein it was stated that the G loan was for RM600,000. However in the present suit the same deponent of the plaintiff filed an affidavit in support *ex parte* for an interim injunction alleging that the loan was RM1 million. There was no explanation whatsoever of this discrepancy. The defendants also claimed that the plaintiff had abused the process H of the court. The plaintiff obtained the *ex parte* order on 13 December 2007 and attended to serve the same on 18 December 2007. However, on 15 December 2007, the plaintiff purportedly using the said *ex parte* order seized the office premises of the 1st defendant by putting a lock on the front door of the I premises before it even served the court order. The *ex parte* order did not say that it can seize the office premises of the 1st

defendant. It had also taken over the business operation of the 1st defendant using the said *ex parte* order again before it even served the said order.

Held (dismissing encl. 4 with costs and allowing encls. 11 and 12 with costs):

(1) The plaintiff had failed to disclose a material fact that in the inter-pleader proceeding summons that the loan that was granted to the defendants was for a sum of RM600,000 whereas in the current suit in this court the plaintiff had alleged that the loan was for a sum of RM1 million. There was a clear discrepancy with respect to the actual amount of loan that the plaintiff had lent to the 1st defendant and should there be any legal reason for the difference this must have been disclosed in the *ex parte* injunction sought for and obtained by the plaintiff. (para 4)

(2) The plaintiff had abused the process of the court by acting on a frolic of its own after having obtained the *ex parte* injunctive order from the court. Even before the order was served on the defendants the plaintiff had proceeded to lock up the office of the 1st defendant and had issued notices to the limousine drivers of the 1st defendant in order that they pay their rental direct to the director of the plaintiff. (para 5)

Legislation referred to:
Rules of the High Court 1980, O. 29 r. 1(2BA)

For the plaintiff - Mohd Rizal Bahari (D Paramalingam & Norafizah Ismail with him); M/s Bahari & Bahari
For the defendants - Justin TY Voon (Alvin KW Lai with him); M/s Sidek Teoh Wong & Dennis

Reported by Amutha Suppayah

JUDGMENT

Kang Hwee Gee J

This is my oral judgment (ex-tempore):

[1] There are three applications in today's proceeding as follows:

1. *Inter partes* hearing of the application granted *ex parte* on 13 December 2007 (encl. 4);

A 2. Application by 1st defendant to set aside the *ex parte* injunction (encl. 11);

3. Application by the 2nd and 3rd defendants to set aside the *ex parte* injunction (encl. 12).

B **[2]** It would be appropriate that the court proceeds to hear encls. 11 and 12 first as there would be no necessity to hear encl. 4 should the defendants succeed in their application to set aside the *ex parte* order. Both the applications encl. 11 and encl. 12 are based on similar grounds as follows:

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1. There is a very serious non-disclosure of material fact before this court with respect to the actual loan agreement between the parties. The same plaintiff had earlier filed an affidavit in the inter-pleader proceeding commenced by the solicitor
D holding the document as a stakeholder of the parties' document in relation to a loan granted by the plaintiff to the 1st defendant now the subject matter of this action. In the said affidavit (exh. "A9" of encl. 9 of the defendants' affidavit in reply) filed by the plaintiff in the inter-pleader suit the
E plaintiff has categorically represented to the court that the loan was for RM600,000 by which a copy of the purported loan agreement was exhibited in exh. "A8" in encl. 9 before this court. However in this current suit the same deponent of the plaintiff Encik Mohd. Pirdaus bin Idris has filed an affidavit in
F support of *ex parte* application for an interim injunction which can be found in encl. 3 and in this affidavit the plaintiff now categorically alleged that the loan is for the sum of RM1 million with reference to a different purported loan agreement which can be found in exh. "A6" of encl. 9. There is no
G explanation whatsoever of this serious discrepancy. The plaintiff has omitted to exhibit in its affidavit in support the actual agreement exhibited in that suit. We submit that there is a serious inconsistency as well as non-disclosure of material fact by the plaintiff in obtaining the *ex parte* order and the
H order therefore should be set aside by this court.

2. The plaintiff has abused the process of the court. The plaintiff obtained the *ex parte* order on 13 December 2007. However, it only begin to attend to serve the same on 18 December
I 2007. This can be seen in exh. "A1" of encl. 9 in respect of its cover letter to serve the cause paper and the *ex parte* order which is stated 18 December 2007. On 15 December 2007

after 8pm at night the plaintiff purportedly using the said *ex parte* order seized the office premises of the 1st defendant by putting a lock on the front door of the premises before it even served the court order. It even broke the alarm and also pasted a police report lodged by the plaintiff's director Encik Mohd. Pirdaus. The said police report can be seen in exh. "A15" of encl. 17. The content of this police report *inter alia* states that "saya telah menyita pejabat di alamat ... atas arahan mahkamah". The *ex parte* order did not say that it can seize the office premises of the 1st defendant. More so where the defendants had not been served with the court order. It is a known law that until the order is served the plaintiff does not have any right to act on the order.

3. The plaintiff has not been forthright to this court. The plaintiff in para. 16 of the said affidavit encl. 16 alleged on oath that it never used the order to seize the office of the 1st defendant. This is blatantly untrue because its own police report lodged by the same deponent who affirmed the affidavit in encl. 16 categorically stated in the police report "Saya telah menyita pejabat di alamat ... atas arahan mahkamah."

4. It has also taken over the business operation of the 1st defendant using the said *ex parte* order again before it even served the said order, having only served the order of the court on the 3rd defendant only on 18 December 2007. The irrefutable proof that the plaintiff has taken over the business operation of the 1st defendant can be found in exh. "A5" of encl. 9 where Mohd. Pirdaus, plaintiff's director, wrote a letter dated 14 December 2007 which can be found in exh. "A5" of encl. 9 addressed to all the limousine drivers of the 1st defendant stating that all payments due to the 1st defendant shall be given to Mohd. Pirdaus and his wife Nuraini Bahoa Abdullah. This is not within the ambit of the court order but the alleged letter dated 14 December 2007 *inter alia* referred to the court order and also annexed the court order to the letter.

5. The plaintiff has breached the very court order that they obtained. Although Mohd. Pirdaus is not a director of the 1st defendant he should not have acted purportedly as the agent of the 1st defendant in dealing with the assets of the 1st defendant. This is because the *ex parte* order itself expressly

states that the 1st defendant or its agent is prevented from touching the assets. A *fortiori* where the plaintiff itelf touches the assets of the 1st defendant company as in this case.

6. The defendants are seriously prejudiced because the defendants as the directors and shareholders of the company cannot even operate their own business. The plaintiff itself has pleaded in para. 6 of the statement of claim that at all material times the 2nd, 3rd and 4th defendants are the directors of the company.

[3] This application to set aside the *ex parte* order is opposed on the following grounds:

1. We deny the allegation by the defendants that there is a serious non disclosure. The agreement in exh. "PI3" for RM1 million was witnessed and initialed by the solicitors of the 1st defendant at that time. The agreement for RM600,000 that was used in the inter-pleader proceeding in Court No. 4 was not witnessed nor initialed by the solicitors of the 1st defendant at that time.

2. We did not delay the service of the *ex parte* order to the defendants. However, we received the order from this court on 14 December 2007 at 4pm. Any *ex parte* order can be served within one week of the date of the order granting the interim injunction (O. 29 r. 1(2BA)). We did not delay and the service of the *ex parte* order was made within the time period.

3. With respect to the allegation of having locked the office of the premises on the night of 15 December 2007 before the service of the *ex parte* order on the defendants, we deny we misused the order. The plaintiff had harboured the fear that if the office of the 1st defendant was not locked up then the 2nd, 3rd and 4th defendants might transfer all the relevant documents regarding the 1st defendant business to other place which cannot be found by the plaintiff and this will prejudice the right of the plaintiff to take over the 1st defendant company by virtue of the fact that Court No. 4 had already decided on the inter-pleader summons that all the shares belonged to the plaintiff. Even though the plaintiff had locked the office premises of the 1st defendant however the plaintiff never occupied the premises or take over the business of the

1st defendant. It was all done with the good intention of protecting the plaintiff's own right and the dissipation of the assets of the company upon being adjudicated the proprietor of the 1 million shares of the 1st defendant company by the inter-pleader summons at the Court No. 4.

4. We deny that we have taken over the business or management of the company. We had merely locked the office up and issued the notices to the limousine drivers merely as a notice to inform the drivers that the plaintiff had a court order and in order to secure the future rights of the plaintiff for in the event that if the drivers paid their dues to the 2nd, 3rd and 4th defendants the plaintiff would not be able to recover without going through the tedious process of judicial recovery process.

Findings And Decision

[4] Having heard the submissions of the parties with reference to the respective affidavits it is clear that the plaintiff had failed to disclose a material fact that in the inter-pleader proceeding summons before Court No. 4 the loan that was granted to the defendants was for a sum of RM600,000 whereas in the current suit in this court the plaintiff had alleged that the loan was for a sum of RM1 million. There is a clear discrepancy with respect to the actual amount of loan that the plaintiff had lent to the 1st defendant and should there be any legal reason for the difference this must be disclosed in the *ex parte* injunction sought for and obtained by the plaintiff.

[5] The plaintiff had also abused the process of this court by acting on a frolic of its own after having obtained the *ex parte* injunctive order from the court. It is clear that even before the order was served on the defendants the plaintiff had proceeded to lock up the office of the 1st defendant and had issued notices to the limousine drivers of the 1st defendant in order that they pay their rental direct to Encik Mohd. Pirdaus as a director of the plaintiff.

[6] On these grounds alone the *ex parte* order must be withdrawn and be set aside with immediate effect. The defendants shall be entitled to damages based on the undertaking to pay such damages upon been granted the *ex parte* order. The plaintiff shall be forfeited of its right to make any application for an interim

injunction of a similar nature. This should not however prejudice whatever right it may have in its claim on the shares of the 1st defendant company.

[7] The plaintiff shall pay the costs of this application.

[8] Enclosure 4 is dismissed with costs.

[9] Enclosures 11 and 12 are allowed with costs.